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Supreme Court, U.S.
FILED

01-73 JUL 10 2001

OFFICE OF THE CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JESUS JOSE ESCOBAR,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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23 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does a conflict exist among the United States courts of appeals, as well as between these courts and the Supreme Court, as to the correct interpretation of "final conviction" for purposes of determining the one year statutory deadline for filing a 28 U.S.C. § 2255 proceeding?

2. Did a United States court of appeals announce a new rule of criminal procedure that conflicts with the decisions of the Supreme Court?

3. If a new rule of criminal procedure is applied retroactively to preclude a defendant, who would otherwise be clearly entitled to habeas corpus relief, from obtaining a hearing on a § 2255 motion, should the doctrine of equitable estoppel be applicable?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Fifth Circuit.

More specifically, the Petitioner and the Respondent are the only parties, neither of which is a company, corporation or subsidiary of any company or corporation.

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Jesus Jose Escobar, the Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on April 11, 2001.

OPINIONS BELOW

The April 11, 2001 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is an unpublished decision, reported at Cause No. 00-40721 in the State of Texas, and is reprinted in the separate Appendix A to this Petition. The prior opinion of the United States District Court for Southern District of Texas, entered on April 26, 2000, is an unpublished decision, reported at Cause No. C-96-CR-84-1 in the State of Texas, and is reprinted in the separate Appendix B to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 2001. The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

28 USC § 2255 provides in part as follows:

> "A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest -
> (1) the date on which the judgment of conviction becomes final;
> (2) the date on which the impediment to making a motion created by governmental action in violation of

the Constitution of laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence."

Supreme Court Rule 16 (3) provides in relevant part as follows:

> "Whenever the Court denies a petition for writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment was sought to be reviewed. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice."

STATEMENT OF THE CASE

The criminal cause of action underlying this appeal was initiated by the United States Government, through the United States Attorney's Office for the Southern District of Texas, Corpus Christi Division, for violations of Title 21 U.S.C. § 841 and 846, and 18 U.S.C. § 2. On October 4, 1996, a jury found Petitioner, Jesus Escobar, guilty of Conspiracy to Possess with Intent to Distribute Marijuana and Aiding and Abetting to Possess with Intent to Distribute Marijuana in violation of 21 U.S.C. §§ 846 and 841(b)(1).

On December 20, 1996, Escobar was sentenced to serve

292 months in the Bureau of Prisons followed by 60 months of supervised release. The Judgment was entered on December 20, 1996.

On December 31, 1996, Escobar appealed his conviction and sentence to the United States Court of Appeals for the Fifth Circuit. On December 4, 1997, the Fifth Circuit Court of Appeals affirmed his conviction and sentence. A Petition for Rehearing was denied on January 8, 1998. On April 6, 1998, a Petition for a Writ of Certiorari was filed with the United States Supreme Court. This Petition was denied on October 5, 1998. A Petition for Rehearing was then filed, and denied on January 11, 1999.

Once his avenues of direct review had been exhausted, Escobar filed a Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255 on January 10, 2000, less than one year from the date his Petition for Rehearing was denied by the Supreme Court. The § 2255 motion alleged for the first time that Escobar had not received effective assistance of counsel due to an actual conflict of interest. Relying on *United States v. Thomas*, 203 F.3d 350 (5th Cir. 2000), on April 26, 2000, the District Court denied Escobar's Motion to Vacate Sentence without a hearing. The Court ruled that more than one year had elapsed from the date when Escobar's conviction became final because certiorari was denied on October 5, 1998, and the § 2255 motion was therefore time-barred.

On June 23, 2000, Escobar timely filed his Notice of Appeal and Application for Certificate of Appealability to the United States Court of Appeals for the Fifth Circuit in compliance with Fed.R.App.P., Rule 4 and 28 U.S.C. § 2253(c). On August 15, 2000, the Application for Certificate

of Appealability was granted.

Thus, this case went back to the Fifth Circuit for a determination of three issues. As a basis for his first point of error, Escobar argued that a conviction does not become final until the availability of appeal is exhausted and a Petition for Certiorari finally denied. *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). As a basis for his second point of error, Appellant argued that a new rule of criminal procedure was announced in *Thomas, supra*, and should not have been applied retroactively to this case where the conviction was already final prior to the announcement of the new rule, and was already pending challenge on collateral review before the *Thomas* opinion had issued. *Teague v. Lane*, 489 U.S. 288 (1989). Lastly, Appellant argued that the doctrine of equitable tolling of the § 2255 statute of limitations should be applied in this case due to the extraordinary circumstances. *United States v. Patterson*, 211 F.3d 927 (5th Cir. 2000).

REASONS FOR GRANTING THE WRIT

1. This Honorable Court should grant Petitioner's Writ of Certiorari to resolve the conflict between the United States Courts of Appeals, and between the courts of appeals and the Supreme Court, as to the correct interpretation of "final conviction" for purposes of determining the one year statutory deadline for filing § 2255 proceedings. Supreme Court Rule 10 (a) and (c).

As set forth in the preceding Statement of the Case, Petitioner submits that the precedent case law defining "final conviction" demonstrates that a new definition of this term was

announced in *Thomas* which contravenes stare decisis. *United States v. Willis*, 202 F.3d 1279 (10th Cir. 2000). It was once well settled that a criminal conviction only became "final" after all avenues of direct review had been exhausted. *E.g., Griffith v. Kentucky, supra*; *Webb v. Beto*, 457 F.2d 346 (5th Cir. 1972). It was also clearly established law that a collateral attack on a conviction through habeas corpus should not be initiated while a direct appeal is still pending. *E.g., Welsh v. United States*, 404 F.2d 333 (5th Cir. 1968).

However, a series of cases interpreting "final conviction" for purposes of determining when the one year statute of limitations runs for filing an Anti-Terrorism and Effective Death Penalty Act (AEDPA) motion pursuant to 28 U.S.C. § 2255, have now muddied the precedent. *United States vs. Garcia,* 210 F.3d 1058 (9th Cir. 2000)*; United States vs. Thomas,* 203 F.3d 350 (5th Cir. 2000)*; United States vs. Willis,* 202 F.3d 1279 (10th Cir. 2000)*; Gendron v. United States*, 154 F.3d 672 (7th Cir. 1998); *Kapral v. United States*, 166 F.3d 565 (3rd Cir. 1999); *United States v. Burch*, 202 F.3d 1274 (10th Cir. 2000); *Murphy v. Johnson*, 205 F.3d 809 (5th Cir. 2000). A review of these cases makes apparent the confusion amongst the circuits.

In the particular case where a writ of certiorari is denied by the Supreme Court and a petition for rehearing is then filed, *i.e.*, direct review continues, there are no cases which contradict the "all avenues of direct review have been exhausted" precedent definition of final conviction. Nonetheless, the *Thomas* and *Willis* opinions now set out that a conviction becomes final on the date that certiorari is denied irregardless of whether a petition for rehearing is sought. Both *Thomas* and *Willis* hold that the filing of a petition for rehearing of the denial of certiorari will not delay the commencement of the one year statute of limitations period for § 2255 purposes! *See also, Burch, supra.* However, in neither

Thomas nor *Willis* was a petition for rehearing actually filed. In the instant case, Appellant did file a petition for rehearing. This distinction is important because Appellant's conviction was still being pursued on direct review.

The Fifth Circuit had consistently held that a final conviction is defined by the exhaustion of the right to further direct review, and that a collateral challenge to a conviction may not do service for an appeal. *E.g., United States v. Placente*, 81 F.3d 555 (5th Cir. 1996); *United States v. Walker*, 68 F.3d 931 (5th Cir. 1995); *Brown v. Cain*, 104 F.3d 744 (5th Cir. 1997); *See also*, 28 U.S.C. § 2255 Rule 5, Advisory Committee Note (a § 2255 motion is inappropriate if the movant is simultaneously appealing the decision). In *Webb v. Beto*, 457 F.2d at 347, the Fifth Circuit held that a definition of "final" while a writ of certiorari is pending in the United States Supreme Court "is an arbitrary classification utterly lacking in rational justification and constitutionally impermissible under the Fourteenth Amendment." And yet, the Fifth Circuit ignored its own precedent in announcing its opinion in *Thomas*. Furthermore, the Fifth Circuit ignored Supreme Court precedent. *Griffith v. Kentucky, supra*; *United States v. Johnson*, 457 U.S. 537 (1982); *see also, Kapral v. United States*, 166 F.3d 565 (3rd Cir. 1999).

It appears that *Thomas* and *Willis* disregard all established precedent regarding finality of conviction and the time for beginning collateral attack. These holdings presuppose the merits of an appeal by deeming it final before it has been finally decided. If there is no possibility that the United States Supreme Court will grant a petition for rehearing, why have a procedural mechanism for petitioning for one? Furthermore, what will the definition of "final" be if a petition for rehearing is granted? Should the petitioner begin collateral attack

through habeas corpus and then drop the collateral attack if he obtains relief on direct review?

The issue of finality can be resolved with a bright line rule: A conviction becomes final when all avenues of direct review are exhausted. Otherwise, the circuit courts of appeal will continue to formulate different interpretations of "final" which ignore long standing concepts of finality. For example, in *Rhine v. Boone*, 182 F.3d 1153 (10th Cir. 1999), the Tenth Circuit, ignoring Supreme Court precedent, held that the period during which a writ of certiorari from a state conviction was pending did not toll the one year statute of limitations. However, in *Caspari v. Bohlen*, 510 U.S. 383 (1994), the Supreme Court had specifically held that "final" means after a writ of certiorari from a state conviction has been denied! The opinions of the various circuits cited herein demonstrate the confusion unnecessarily created by the arbitrary designation of various definitions of finality. As pointed out in *Thomas*, there is disagreement and conflict among the circuit courts with respect to finality of conviction for § 2255 purposes. The purpose of a statute of limitations is to clearly define the time period in which suit must be commenced. A defendant should not have to speculate about finality, but rather should be permitted to exhaust all avenues of direct review before pursuing a collateral attack.

Petitioner submits that a proper interpretation of the AEDPA statute of limitations is best determined by looking to established Supreme Court precedent, rather than making new interpretations of other procedural rules, *i.e.*, Supreme Court Rule 16.3. As stated by the Fifth Circuit in *Thomas*, at 354, "Congress did not intend to disrupt settled precedent by requiring that criminal defendant's pursue collateral relief before the time for seeking direct review expires and during a time period in which he or she may still rightfully be

considering the wisdom of further direct review. Indeed, such a rule would be inconsistent with well-settled principles of finality in the collateral review context. Collateral attack is generally inappropriate if the possibility of further direct review remains open. Such a rule would also be inconsistent with analogous Supreme Court precedent." (citations deleted) and yet the fifth circuit did disrupt settled precedent.

Stare decisis dictates that long standing definitions of "final" should control the interpretation of that term for § 2255 purposes. Petitioner respectfully submits that "final conviction" for § 2255 purposes should mean when all avenues of direct review have been exhausted. In the instant case, that would mean on January 11, 1999, when Escobar's petition for rehearing was denied by the United States Supreme Court.

2. This court should grant Petitioner's writ because a United States court of appeals has announced a new rule of criminal procedure that conflicts with the decisions of the Supreme Court. Supreme Court Rule 10 (c).

According to *Teague v. Lane*, 489 U.S. 288 (1989), new rules of criminal procedure generally should not be applied retroactively to cases pending on collateral review. *See also, United States v. Shunk*, 113 F.3d 31 (5th Cir. 1997). A "new rule" is one that is not dictated by precedent existing at the time a conviction became final. *Graham v. Collins*, 506 U.S. 461 (1993); *Felder v. Johnson*, 204 F.3d 168 (5th Cir. 2000); *Mann v. Scott*, 41 F.3d 968 (5th Cir. 1994). In the instant case, Appellant submits that the *Thomas* opinion relied on by the District Court in denying his § 2255 motion, did announce a new rule of criminal procedure not dictated by precedent.

In *Thomas*, at 352, the Fifth Circuit stated "This is a question of first impression in this circuit." A statute of limitations is procedural rather than substantive. Thus, the new definition of "final conviction" announced in *Thomas* constituted a "new rule" by setting forth a statute of limitations not dictated by precedent. This new rule should not have been applied retroactively to Petitioner's case which had become "final" and was already pending on collateral review in February, 2000 when the *Thomas* opinion was issued.

Also noteworthy on the issue of whether or not the *Thomas* opinion announced a new rule of criminal procedure, is the fact that the circuit courts are in such conflict about the proper interpretation of "final" for § 2255 purposes, and the Supreme Court has not yet resolved this issue. *Butler v. McKellar,* 494 U.S. 411 (1990); *Coe v. Bell,* 161 F.3d 320, 353 (6th Cir. 1998); *See also, Truman v. Johnson,* 205 F.3d 844 (5th Cir. 2000). Furthermore, existing precedent at the time Petitioner filed his § 2255 motion on January 10, 2000, dictated that "final conviction" meant all avenues of direct review had been exhausted, and collateral attack should not be commenced while direct review is pending.

In *Brown v. Cain, supra,* at 749, the Fifth Circuit, citing *Landgraf v. USI Film Products,* 511 U.S. 244 (1994), stated that if a new rule of criminal procedure attaches new legal consequences to events completed before its enactment, it should not be applied retroactively. In the instant case, applying the new rule of *Thomas* retroactively to the date Escobar had already timely filed his § 2255 motion, has the consequence of barring him from presenting a meritorious claim of egregious constitutional violations. There is no way Appellant could have known that his conviction had become final prior to his petition for rehearing having been denied when there was no such procedural rule in effect until after he

had timely filed his § 2255 motion within one year of the date of said denial.

The court in *Brown v. Cain* also stated that if application of the new rule would upset settled expectations based on reasonable reliance upon the "old" rule, or work a "fundamental injustice", a new rule should not be applied retroactively. *See also, Butler v. McKellar*, 494 U.S. 407, 415 (1990). Again, Petitioner did have a settled expectation that if he filed his § 2255 motion within one year of the date direct review was exhausted, *i.e.*, one year from the date his petition for rehearing was denied, then based upon the existing definition of "final conviction" he was timely. Furthermore, to retroactively apply an unforseen new rule of procedure would work a fundamental injustice because Petitioner was sentenced to 25 years in prison with trial counsel who, admittedly, was laboring under an extreme actual conflict of interest.

3. If a new rule of criminal procedure is applied retroactively to preclude a defendant, who would otherwise be clearly entitled to habeas corpus relief, from obtaining a hearing on a § 2255 motion, should the doctrine of equitable estoppel be applicable?

Petitioner herein was careful and diligent in determining when the one year statute of limitations for filing his § 2255 motion would expire. Having contacted the United States Supreme Court to ascertain the exact date that his writ of certiorari was finally denied when his petition for rehearing was denied, January 11, 1999, Petitioner made sure that his § 2255 motion was filed within one year of that date. As previously discussed in this Petition, Escobar could not have predicted that new case law interpreting the language of § 2255 would subsequently change the deadline for filing his §

2255 after he had already filed it. Nonetheless, the one year statute of limitations contained in § 2255 is subject to the doctrine of equitable tolling. *United States v. Patterson*, 211 F.3d 927 (5th Cir. 2000); *Davis v. Johnson*, 158 F.3d 806 (5th Cir. 1998); *Miller v. New Jersey State Dept. of Corrections*, 145 F.3d 616 (3rd Cir 1998). Equitable tolling applies principally where a plaintiff is misled or prevented in some extraordinary way from timely bringing his cause of action. *E.g., Patterson*. In the context of the denial of a post-conviction relief motion, courts must be very cautious not to apply a statute of limitations too harshly. *Id.*

A determination of the applicability of equitable tolling is dependant on the specific circumstances on a case by case basis. Petitioner submits that the situation presented in the instant case is extraordinary. In fact, Petitioner could very well be the only defendant in the entire country who had a petition for rehearing from the denial of writ of certiorari denied, within one year of the date of that denial filed a § 2255 Motion to Vacate (timely filed under precedent existing on the date of filing), and then had the § 2255 motion denied as untimely based on *Thomas* which the District Court applied retroactively!

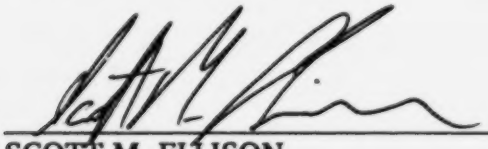
Furthermore, no defendant will ever be in this same situation again because *Thomas* and *Willis* are now available for any defendant who does wish to pursue a § 2255 challenge after the denial of a writ of certiorari. The retroactive application of these cases to deny Petitioner the avenue to challenge his conviction is particularly harsh considering the merits of his claims for relief in his § 2255 Motion. Petitioner's trial and appellate counsel on direct review to the Fifth Circuit admits that he had an actual conflict of interest which interfered with his effective representation. Denial of his constitutional right to effective assistance of counsel was raised by Petitioner for the first time in his § 2255 Motion.

Petitioner's constitutional claims should be addressed by the District Court.

CONCLUSION

For the reasons stated herein, Petitioner respectfully prays that his Petition for Writ of Certiorari be granted.

Respectfully submitted,



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JESUS JOSE ESCOBAR

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40721
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESUS JOSÉ ESCOBAR,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC Nos. C-00-CV-10 &
C-96-CR-84-1

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

PER CURIAM:*

---

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opnion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Jesus José Escobar, a federal prisoner, appeals from the district court's dismissal of his 28 U.S.C. § 2255 motion as time-barred by 28 U.S.C. 2255's one-year statute of limitations. We have reviewed the record and the briefs of the parties, and we ascertain no reversible error.

Escobar's conviction became final on October 5, 1998, the date on which the Supreme Court denied his petition for a writ of certiorari. *See United States v. Thomas*, 203 F.3d 350, 356 (5th Cir. 2000). Because Escobar filed his 28 U.S.C. § 2255 motion more than one year after this date, the district court did not err by dismissing it as time-barred. *See id.*; 28 U.S.C. § 2255(1). Escobar's assertion that the district court's application of *Thomas* amounted to a violation of *Teague v. Lane*,

489 U.S. 288 (1989), is meritless because *Thomas* merely construed the limitations aspect of 28 U.S.C. § 2255; it did not announce a new rule of constitutional law. Nor has Escobar established rare and exceptional circumstances that

would entitle him to equitable tolling of the limitation period. *See Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998). The district court's judgment of dismissal is AFFIRMED.

U.S. COURT OF APPEALS
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APRIL 11 2001
CHARLES R. FULBRUGE II
CLERK

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA.	§	
	§	
Respondent,	§	
	§	C.R. NO. C-96-84
v.	§	C.A. NO. C-00-10
	§	
JOSE JESUS ESCOBAR,	§	
	§	
Petitioner.	§	

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

AS TIME BARRED

Petitioner's judgment of conviction became final on October 5, 1998, the date on which the Supreme Court denied Escobar's petition for writ of certiorari on direct review. *See United States v. Thomas*, 203 F.3d 350, 356 (5th Cir. 2000). Petitioner untimely filed his § 2255 petition on January 10, 2000, more than one year after his judgment of conviction became final. *See* 28 U.S.C. § 2255(1) (2000). None of the alternative start dates of § 2255 are alleged to

be applicable in this case. Accordingly, Respondent's Motion to Dismiss as Time Barred [D.E. 632-1] is GRANTED.

ORDERED this 26 day of April, 2000.

S/_____
H. W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

United States District Court
Southern District of Texas
ENTERED
APR 27 2000
Michael N. Milby
Clerk of Court